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LIFE AND SERVICE OF JOHN BIRDSALL¹

ADELE B. LOOSCAN

Preliminary to a sketch of the services of Judge John Birdsall to the Republic of Texas, a glance at the condition of governmental affairs soon after the Battle of San Jacinto and during the first term of Houston's administration seems necessary.

The careful student of that period of history comprised under the "Provisional Government," is strongly impressed by the frequent changes in the members of President Burnet's cabinet. The time was turbulent in the extreme; the rapid execution of important measures became more and more urgent, as adverse circumstances encompassed this little band of civic patriots. Deaths by accident, withdrawals from service on account of chronic illness, depleted the cabinet as originally formed, while the imperative need of efficient Commissioners to the United States in behalf of recognition, and the establishment of diplomatic relations, further contributed to change the personnel of government officials. Demoralization, following closely in the train of victory, encouraged discontent, and this, united with treachery, threatened to destroy the sole nucleus of order and safety. That no constructive fabric of government could grow under these conditions is self-evident, and in this conclusion there is no disparagement intended of the

¹Circumstances having placed in my hands letters and documents inaccessible to students, induced me to collect from other sources all available material for illustrating the character and service of John Birdsall, Attorney General of the Republic of Texas.

I am indebted to Colonel Andrew J. Houston for documents and letters culled from his father's official correspondence; these while few in number, yet afford an insight into the important contributions made by this officer to the development and formation of the new government of Texas. Were no others obtainable, they alone would constitute a memorial, tardy and incomplete though it be, to a worthy man, whose service has hitherto been unappreciated, because unknown.

My thanks are due to Miss Elizabeth West, State Librarian, and her assistant, Miss Elliott, for lists of subjects handled by him while Attorney General and Acting Secretary of State; to James Sullivan, State Historian of New York, for confirmation of his official service in that State; and to E. W. Winkler, Reference Librarian of the University of Texas, for important items from books and documents. *The Morning Star*, newspaper, published at Houston in 1839, gave, on two successive days, editorials descriptive of his death and funeral, pathetic in detail, and accurate in

fine men of known ability, who, at a later date, confirmed the estimate originally placed upon their talents.

The "Constitutional Government," with Houston as President, gave promise of progress, but the efficiency of his cabinet was in its initial stage greatly impaired by the loss of Austin, Secretary of State, whose death occurred in the midst of the performance of his first official acts.

J. Pinckney Henderson, Houston's first choice as Attorney General, succeeded Austin as Secretary of State; his term of office in both positions was of brief duration, as he was soon sent abroad as Minister from the Republic of Texas to the courts of England and France. Then Robert A. Irion, the third Secretary of State, chosen within a few months, filled the office with promise of efficiency and permanency. Birdsall succeeded to the Attorney Generalship when Peter W. Grayson, after a brief tenure of office, resigned. From this time until the close of Houston's first administration these two officials worked harmoniously together. Records show that, at one time, probably on account of illness or absence of Irion, Birdsall performed the duties of his office, signing important documents as Acting Secretary of State.

John Birdsall was descended from a family of that name who emigrated from England in 1657, and acquired lands on Long Island from the Montauk Indians. His grandfather was Lieutenant Colonel Benjamin Birdsall of Dutchess County, New York Militia, whose services are listed in the records of the revolu-

statement, erring only as to the date of his arrival in Texas, which was about November 15, 1836, instead of the spring of 1837.

There seems to have been negligence in the preservation of original documents emanating from officials of the government of the Republic of Texas. The only opinions rendered by Attorney General Birdsall that I have been able to obtain are addressed to the President and Secretary of State, preserved in the office of the latter, and transferred from that office to the State Library. Besides these, this repository contains under the head of "Domestic Correspondence," a few documents and letters among Land Office Papers, one on "Colonization Affairs," and one in the "Texas-United States Diplomatic Service" to Alcée La Branche, Chargé d'Affaires of United States, bearing his signature as Acting Secretary of State.

Reports as Attorney General, made to the President on matters of judicial importance which have not been recorded elsewhere are embodied in this memoir. They illustrate well the painstaking character of the man and the fine legal judgment of the jurist. It is safe to assume that were there full records extant of his valuable services, they would prove that he contributed much to build up the judicial system of the Republic, whose policies were in large measure inherited by the State.

tionary forces. The family, at a later period, having removed from the Hudson River to Western New York, found homes in different parts of that region. John Birdsall's father, Maurice, located at Greene, Chenango County, whence John, while quite young, emigrated to Chautauqua County. His talent as a lawyer was fully recognized by Governor De Witt Clinton, who appointed him Court Judge of the 8th Judicial Circuit, when not quite 21 years of age.² In 1831 he became a member of the New York Assembly from Chautauqua County. He was a member of the New York Senate in the 55th (1832) 56th (1833) and 57th (1834) Legislatures. He resigned as Senator June 5, 1834, on account of ill health.

In the early autumn of 1836 he joined a party of relatives who were moving from New York to Texas, with Harrisburg as their objective point, that being the residence of Mrs. Jane Harris, a daughter of Lewis Birdsall, and widow of John Richardson Harris, the founder of the town.

The party consisted of Lewis Birdsall, his son, Dr. Maurice L. Birdsall, John Birdsall, a nephew, and Mary Jane Harris, a granddaughter. They arrived at Quintana from New Orleans on board the schooner *Julius Caesar* about the middle of November, and proceeded on board the *Yellowstone* to Brazoria, where they spent two weeks at the boarding house of Mrs. Jane Long. This delay was occasioned by the difficulty in getting transportation to Harrisburg. They here made the acquaintance of General Houston and other officials of the new government, then holding its first session of Congress a few miles distant, at Columbia. John Birdsall attended some of these sessions and he likewise met the prisoner, Santa Anna; he was deeply impressed by the dignified bearing of Houston, and especially with the wisdom and humanity of his policy toward the fallen foe.

²Mr. James Sullivan, State Historian of New York, wrote on February 4, 1922:

The statement, such as you give in your letter of January 27th, in regard to Judge Birdsall, is correct, and it has been verified by this office.

In addition the Civil List shows as follows:

John Birdsall, of Mayville, N. Y., was a circuit judge in the 8th circuit, appointed April 18, 1826. Jenkins' "History of Political Parties in New York," page 320-21, shows that Birdsall, "a moderate Clintonian," was nominated by Governor Clinton as a compromise candidate for the judgeship, and confirmed.

Family letters reveal the impressions of the Birdsalls, newcomers into this land of promise; buoyant hopes battled with bitter disappointment, when, after long delays, they faced the desolation which the war had wrought at the home of their only relative in Texas. The town of Harrisburg, having been completely destroyed by the Mexicans, had not been rebuilt, while the new town of Houston, recently placed on the map, was to become at once the center of government, a town of daring enterprise and the only place for business. John Birdsall opened a law office here, and soon made the acquaintance of and formed a co-partnership with J. T. Gazley, which continued until he entered the public service.

The feeling conceived by Birdsall for Houston at their first meeting promoted a mutual attraction, which grew into friendship, strengthened with time, and knew no break or interruption. Houston perceived Birdsall's ability as a legal adviser, and Birdsall recognized his superior qualifications for leadership in the Republic, so hardly won from Mexico, and almost in the hour of victory distracted by dissensions and torn by jealousies. A letter from Birdsall to Houston, written in June, 1839, about a month before his death, and kept among Houston's papers, was presented to me by his son, Andrew Houston, and is made a part of this memoir. It shows that the intimacy of their friendship but served to increase that confidence and admiration conceived by the writer when they met at Columbia, and at the same time illustrates his own innate refinement and delicacy in the expression of these sentiments.

Houston, 10th June 1839.

My Dear Genl.

A few days since I wrote you at Nashville, and enclosed the copies you desired from the War Office to the care of Col Wm Christie, N. O.

Since then we have intelligence from Vera Cruz by the Brig Empresario which left the 2d instant and arrived at Galveston on the 6th that a levy and draft is making by the Gov't to fill up the army to 20,000 men for the reduction of Texas.

Col. Bee was rejected in his official capacity with marked contempt, and had sailed for Cuba, being unable to get a passage direct to New Orleans.

We have been so much used to rumours of war of late that our people have grown incredulous, and I fear, over confident.

The Govmt of Mexico now has Santa Anna, Bustamente and the clergy all acting in concert and auxiliary to its energies.

The National spirit is elated with the successful resistance of the French, and the triumph over the Federalists.

The position of Genl Santa Anna will induce him to encourage Bustamente in some expedition against Texas, as, if beaten, Santa Anna's power is strengthened and if successful he is revenged on his enemies. Genl Bustamente, by marching through Tamaulipas and Coahuila may suppress the renewal of the revolutionary spirit in those states, and then with troops self-styled victorious, pass the Rio Grande.

Under this state of things I submit to you whether you ought to go beyond Nashville.

The Country must be saved in despite of the petty prejudices and narrow conceits of little minds. I have seen but one man in Texas competent to manage its defence against a formidable invasion.

A single act of indiscretion might lose the Country. The Fabian policy and a wise discretion as to time and place for fighting if the invasion should be strong, can alone save us.

You know better than anyone else the difficulty with our people of conducting a campaign upon this plan.

Nothing but extraordinary powers of personal command in the Genl can achieve it.

If we are pressed, whatever may be the action or want of action on the part of the Govmt, the nation will require your presence, and with one accord.

When your country calls I know you will not refuse to come—but you must be near or some fatal error may occur before you arrive.

All our friends are well. Texas Money at 30 cts. Do write, and believe me sincerely your fr,

Jno Birdsall.

[Addressed:] Genl Sam Houston
Care of Col Wm Chrystie
Nashville, Tenn.

Please have this letter forwarded without delay.

[Endorsed:] John Birdsall

To Genl Houston, June 10th, 1839.

Immediately after the death of Chief Justice Collinsworth became known, namely, July 17, 1838, the Bar of Brazoria County sent to President Houston, then at Nacogdoches, a very strong endorsement of Birdsall as his successor.

We, the undersigned members of the Brazoria Bar, conceiving it of the last importance to the vital interest of the country that the office of Chief Justice of the Supreme Court should be filled by a gentleman of the highest character for legal attainments,

sterling integrity, unshrinking firmness, and of unimpeachable morals, respectfully beg leave to recommend to Your Excellency John Birdsall Esq.

This appointment would contribute in an eminent degree to the elevation of the bench, to its proper respectability, and the unbounded confidence to which he is entitled, would place the administration of the law upon a certain and sacred basis. Should Your Excellency conceive it necessary to appoint a successor to our lamented late Chief Justice, James Collingsworth, the undersigned cherish the sanguine hope that the merits of Mr. Birdsall are so well known that he will be powerfully recommended to your consideration.

Wm H. Jack.
T. A. Sawyer.
J. Irion.
E. M. Pease.
Pat C. Jack.
John W. Harris.
R. J. Townes.

On August 4 Houston appointed him to this office, on August 10 he accepted, was sworn in, and held the position until the next session of Congress. On November 16, 1838, Houston announced his appointment as Chief Justice. There were three other aspirants for this office in the general election of that year, and on December 12 the ballots showed that Thomas J. Rusk had been elected.

Since the Constitution of the Republic of Texas provided that the President should be ineligible for re-election, the end of his second year of service brought the administration of Houston to a close. Birdsall now resumed his private practice, which had been established on a firm basis, his means were ample, his office well furnished with law books and such conveniences as time and place afforded. Having determined, when coming to Texas to merge his fortunes with those of his adopted country, he invested ready money in lands, town and city lots, together with government securities. He had the respect of the whole community, the devoted friendship of the foremost man in Texas, his judicial and legal experience assured him a liberal share of business in the courts, and he and Houston soon entered into a law partnership which bade fair to be lucrative to them, as well as beneficial to the State.

Their partnership agreement is a model of brevity:

Republic of Texas
County of Harrisburg

Be it known that Sam Houston and John Birdsall have formed a copartnership in the profession and practice of Law in the Republic of Texas.

The copartnership to be equal, and to continue during the pleasure of the parties.

In witness whereof we have hereto set our hands and seals this 8th day of Jany 1839.

Sam Houston
John Birdsall

The close friendship between the partners, promised a long and happy continuance of their new relationship. As the summer advanced, Houston relieved from the duties of public office, and confident that his business interests would be safeguarded, and the trend of public affairs in Texas and Mexico carefully noted by his partner and friend, visited his old home in Tennessee, with the intention of continuing his journey farther to the eastern part of the United States.

Birdsall, pleased with the climate of Texas, and interested in the development of the country, looked forward confidently to the near future, when the chief gulf ports would be resorted to by ships of all nations. In this frame of mind he spent a few days with relatives living at and near Harrisburg, who shared his optimistic views. He was congratulated by them on his improved health, which he declared to be the best he had experienced for years, and returned home in fine spirits. Only a few days afterward he fell a victim to yellow fever, at that period the scourge of the gulf coast. The disease was not at first recognized by the physicians, nor its malignancy fully realized until it had become epidemic, and Birdsall was one of the first cases. He had every attention that friendly, devoted care could render, but all to no purpose. The record of his death and funeral in the leading newspaper of Houston is for the most part accurate, and its touching details prove that a true friend penned the lines. There is little lacking to complete the tale of mortality.

He was a member of the Protestant Episcopal Church, active in organizing this church at Houston. A marble tablet near the

chancel in Christ Church, corner of Texas Avenue and Fannin Street bears his name as one of the Vestry of 1838.

Ever mindful of the uncertainty of life, he had made and signed his will, which bequeathed his property under the trusteeship of Executors to his wife and only child in New York.

The Reverend Chapman of the Episcopal Church read the funeral service at the Capitol and at the grave. A band of music led the procession over the six long miles of winding road through an otherwise unbroken forest, which lay between Houston and Harrisburg, the solemn silence enhanced by the sighing of the wind among the pines, making a requiem of exquisitely sad cadence.

The remains were laid to rest in the graveyard dedicated to the Harrises and Birdsalls which overlooks Buffalo Bayou at a deep bend just below the town. This spot had been selected on account of its picturesque situation, and John Birdsall was the first to fill a grave there.

In recent years adjoining lots have become the property of the Glendale Cemetery Association, and its bounds now include this lot.

There were doubtless portraits of Birdsall in one or more homes in New York, but for us there remains only the contemplation of the form and features of his mind rather than his person—the record of his honorable character and upright conduct in the service of Texas. His untimely death was deeply deplored by relatives and friends, and his amiable qualities often discussed by them. The impression left upon my mind by their encomiums prompts the adoption of the words of a classic writer as admirably suited to convey a just conception of his worth:

“Posterity may wish to form an idea of his person. His figure was comely rather than majestic, in his countenance there was nothing to inspire awe; its character was gracious and engaging. You would readily have believed him a good man, and willingly a great one. And indeed although he was snatched away in the midst of a vigorous age, yet if his life be measured by its glory it was a period of the greatest extent. For after the full enjoyment of all that is truly good, which is found in virtuous pursuits alone, what more could fortune contribute to his elevation? Immoderate wealth did not fall to his share, yet he possessed a decent affluence.

His wife and son surviving, his dignity unimpaired, his reputation flourishing, and his kindred and friends in safety, it may even be thought an additional felicity that he was thus withdrawn. Whatever in him was the object of love, of admiration, remains, and will remain in the minds of men transmitted in the records of his time."

The Hon. John Birdsall died in this city on yesterday, July 22, of a fever. The deceased was born in New York: he was a member of the Senate of that State for several years, and filled other important and very responsible stations. Feeble health compelled him to seek a more genial clime, and in the spring of 1837, he removed to Texas. He came with a high reputation as a Jurist and Statesman, and his fame has been constantly augmenting. Under the late administration, he held the post of Attorney General, and subsequently was appointed Chief Justice of the Republic. Last winter he resumed the practice at the Bar.

It was impossible to be in the society of Judge Birdsall but for a few minutes, without perceiving that he was no ordinary man. His manners were unusually dignified, bland and uniform. Courteous and candid in his intercourse with all persons, his attachment to his intimate friends was marked for its unwavering firmness. The most distinguishing traits of his mind were perhaps the soundness of his judgment and the purity of his motives. At the Bar, and in political discussions, he was far above all sophistry and attempts at victory by dextrous rather than solid argument. Truth and justice were alone his aim; and in the support of his principles, he never descended to any personal attack on those who thought differently from himself.

Judge Birdsall was much younger than would be supposed by those who remember the great dignity of his manners: he was scarcely in the prime of his life, being about forty-two years of age.

He has gone down to the grave with a spotless name. "Finis vitæ ejus nobis luctuosus, amicis tristis, extraneis etiam ignotisque non sine cura fuit."

The funeral of the Hon. John Birdsall was attended on yesterday by a large concourse of citizens, who had assembled to pay the last sad duties to one whom, those who knew him best, deplored the most. The body was taken to the Capitol, where the funeral service was performed, and an address, enumerating the many virtues of the deceased, and impressing upon the minds of the community the loss they had sustained, was delivered by Col. A. S. Thruston, which, though all that the most devoted friend could desire, still left the half untold. After the services, the hearse and the procession, escorted by the Milam Guards, proceeded on the way to Harrisburg, at which place, we believe, is

the family burying ground in this country. Truly has it been said that "Death loves a *shining* mark, a *signal* blow." Volumes, however, could not express the real worth of the deceased, or the regret which the community feels at his departure. "He lives in the hearts of his countrymen."³

Some of the more important official letters and opinion of Birdsall follow:

[December 2, 1837.]

To the Hon. Secy of State

Sir,—In reply to the legal quere of Mr. Reid propounded in his letter to you of Sep. 2nd counting [concerning?] the right of alien Representatives to inherit the estate of decedents in Texas, prior to our revolution, I can only offer the opinion I have already given to my own clients on the same point, which is that as to all estates derived under the Colonization Laws the kindred representatives of the deceased, though aliens may inherit.

The question is one of construction as yet, an open one in the country, and must therefore abide the contingency of judicial action.

Although Spain and probably Mexico seemed to have followed the general practice of modern nations of excluding aliens from the privilege of holding the land of the country, yet I think the special provisions of the Colonization Laws on this subject, taken in connexion with their peculiar policy which was to invite and favor foreign emigration and their necessary tendency to leave many estates without heirs in the country, and therefore lost to the family and friends of the emigrant, unless aliens can hold them will justify a construction enabling them to hold.

Mr. Reid does not state in his letter whether the legal representatives of the deceased and [are?] his children or more remote relations. If they are his children the laws of Nations gives them the benefit of their father's domicile for all the purposes of representing the succession or inheritance. His Domicil is thus if he was a Citizen of Texas at his death they are Citizen heirs, and alien heirs though yet resident in a foreign Country. This is a general principal [sic] of international Law.

Very Respectfully yours etc.

Jno. Birdsall.⁴

³This notice of the funeral was copied by the *Telegraph and Texas Register*, July 24, 1839, verbatim, and in abbreviated form by the *Richmond Telescope and Register*, July 31, 1839.

⁴Record No. 49. Correspondence Secretary of State, Republic of Texas, 1836-1841, p. 108.

Houston, Dec. 14, 1837.

Hon. R. A. Irion Secretary of State,

Sir After an attentive examination of the case of the Brig Pocket, I am satisfied the payment alledged to have been made to the Master at New Orleans in behalf of this Government for the vessel and freight, is obligatory upon the owners and conclusion of their right. The Master is the accredited Agent of the Ship owner, the world over. His Agency terminated by no means with the Captain of the vessel. He still represents the Owners of Ship and Cargo and is bound to use every effort not inconsistent with good faith to protect and benefit their interests. He may arrange with the Captors and purchase the vessel in behalf of the owners before or after condemnation. If the capture is adjudged unlawful he is the person to receive her after judgment of restitution.

The Agency of the Master in this case was continued in behalf of the owners, independent of receiving payment for the vessel and freight by the most solemn act he is ever called on to perform in his official character, viz: his protest against the Capture. This document bears date after the sale of the Brig to Messrs Toby and Brothers, and after having received full payment for vessel and freight. The insurers in New York should have been apprized of this arrangement with the Master. Had the Protest been accompanied with this information the Insurance Company would have given a prompt and decided refusal to any application of the assured for either a total or partial loss. Whether Messrs Barclay and Livingston were possessed of this information does not appear—but as regards our responsibilities in the matter it is in my judgment quite immaterial whether they were or were not apprized of it. It would be most extraordinary if these parties arranging with the general Agent of the assured as the owners of the vessel were responsible for the faithful application of funds committed to his hands in the regular course of his agency, or for losses resulting from his bad faith or inattention. The demand in this case of the Insurance office does not appear to have been paid, by any document presented to us. I should infer from the deposition of the President of the Co. that, it was suspended for investigation. If the payment to the Master, made as it was in perfect good faith, and for the benefit of the concerned, is brought to the knowledge of the Co. I cannot doubt it will at once silence all claims on their part upon this Government.

Very Respectfully Yours &c.

J. BIRDSALL, Atty. General.⁵

⁵The above is an accurate copy of the opinion of Attorney General J. Birdsall on the Brig Pocket which is found in the *Records of the Depart-*

N. B. It will of course be necessary to procure the requisite proofs of payment having been made to Capt.

[November(?) 1838]*

To His Ex The President of the Republic of Texas.

Sir, I have looked into the treaty with the Cherokee Indians and their associate Bands together with the documents accompanying the same, and have endeavoured to bestow upon them the consideration and reflection which their importance demands.

As far as it was possible for the General Consultation to concede and establish the right of the tribes in question to the territory designated, the Indian title was guaranteed by that Body in their solemn Declaration and Pledge made on the 13th of Nov '35 and severally signed by all the members of that body. The language of that instrument partakes largely of the strong and deep feeling that marked the crisis at which it was put forth. It would be difficult to combine language in any form better calculated to produce with those to whom it was addressed, implicit and unqualified confidence as to its truth and sincerity.

A departure at this time from its stipulations and professions, without good cause, cannot fail to be regarded by the Indians and the world, as an act of the grossest perfidy and injustice.

If it were admitted that the Consultation transcended its legitimate powers in executing the Declaration and Pledge referred to, still as the Indians could not be presumed to know, and did not in fact know the limitations, if any, that were imposed upon the authority of that body, the principles of common justice and good faith would seem to require its fulfillment by the people of Texas.

A little attention, however, to the character of that Body and the subsequent course of the Government, will, I think, satisfy all, that its powers were fully equal to the authority it assumed. This Body consisting of about sixty members was a radical and primary representation of the people of all Texas in their political capacity.

They assembled independently of Coahuila and the political organization which had formerly existed, and by this act became virtually severed and separate from the Mexican empire. They were the only political authority known to the country for the time being, and were therefore necessarily charged with the duties and attributes of Government.

ment of State, Book 49, page 111, on file in the archives of the Texas State Library. For an account of this case see *THE QUARTERLY*, XII, 276-295.

*Copy of Opinion of John Birdsall *in re* Cherokee treaty, from papers in possession of Col. Andrew J. Houston, who says, "In a message to Congress the president quoted this opinion in full." See *House Journal*, Third Texas Congress, 1st Session, 87-93. Houston's message is dated November 19. For the history of this treaty see above, this issue of *THE QUARTERLY*, 16-18.

They were the Government *De facto*, they exercised the prerogatives of government, they suspended the land laws and closed the Courts of justice, they enacted laws and caused them to be executed, they levied troops, created civil and military officers, placed the country in a position of defense, and finally organized a provisional government.

If there was any one subject more immediately connected with their duties than another, or more clearly within the range of their powers, we should infer from the history of that period, it was that of our relations with the Indian Bands upon the Northern frontier. Aware of the importance of cultivating a friendly understanding with these Indians, the Mexican Government had in May '35 made provisions for selecting from their vacant lands in Texas such a district as should seem most appropriate for their location.

On the 13th of Nov. following, the Consultation appreciating the policy of such an arrangement, made their Declaration and Pledge.

If this was not within the scope of their powers, was the closing of the land offices and the suspension of the land system by them a lawful act. Or if unlawful, are all the titles and surveys made since the offices were ordered to be closed, legal and valid. A little reflection will show us that any attempt to restrain the powers of the Consultation within special limits, and sustain or validate their acts as they seem to fall within special limits, and sustain or invalidate their acts as they seem to fall within or beyond those limits, involves consequences to this country of the most serious character.

In December '35, the provisional Government established by the Consultation appointed Commissioners to treat with the Indians, in pursuance of the proffer in the Declaration and Pledge, they commissioned them, gave them written instructions and despatched them on their missions. Their labors resulted in the treaty of 23 Feb, 1836.

It will be observed that so far as concerns the claims of the Indians to the District of Country assigned them, as lying "north of the San Antonio Road and the Neches and west of Angelina and Sabine Rivers," their right is concluded and established by the Declaration and Pledge. To this extent it had become a vested right and the only office of the Commissioners upon this part of the treaty was, to ascertain and fix with more precision, if possible, the bounds and limits of the grant.

I have compared with some attention the provisions of the treaty with the instructions furnished the Commissioners, and am unable to discern any discrepancies unfavorable to the Government.

That it would be more convenient to have all the lands of the

Republic cleared of Indian claims, and subject to the disposition of our own citizens, is very plain—but that they also are of right entitled to a resting [place] and suitable provision in the country where their lot has been cast is equally plain, and, whatever may be the disparity between them and us in point of intelligence, power, and social condition, they have the same right as ourselves to the benefit of those great principles of natural justice and equity, which are immutable and universal.

I have been favored by Chief Justice Collingsworth with a perusal of the note of his opinion on this subject, and fully concur in all the views he presents.

With great respect Your Obedt Servt

Jno. Birdsall.

Atty. Genl.

To President Houston

Sir, In reply to your Excellency's note requiring my opinion whether a Judge of the District Court can compel the Commissioners of the County land boards, by mandamus, to issue certificates to persons whose claims have been rejected by the boards, and whether the proof by the applicant and witnesses to establish his claim before the boards can be taken upon interrogatories under the order of a Judge, and the Commissioners be required to act upon it, I have the honor to state, in answer to the first inquiry, that the boards of Commissioners in hearing and deciding upon a claim presented to them, act in a judicial and discretionary capacity—they are to hear and weigh the proofs offered, and if satisfactory to pass the claim, otherwise reject it.

It is a well established rule that whenever a discretion is allowed an officer or board of officers in acting upon any matter, their judgment or decision cannot be controlled by the writ of Mandamus.

Besides this in the case of the land Commissioners a specific remedy is given the party claiming to be aggrieved, by appeal to the District Court, under the 16th section of the law.

In answer to the 2nd Inquiry, my opinion is that the land law contemplates a personal appearance of the claimant and his witnesses before the board of Commissioners in all cases, and relies upon this as the most efficient and important safeguard against frauds and impositions. The phraseology of the law fully justifies this construction and its policy certainly would require it.

With great respect your obedt servt

Jno Birdsall.⁷

Houston 30th Apl 1838

⁷Some twenty-five additional Birdsall letters and documents are to be found in various collections in the State Library. The most important repositories are Letter Book No. 2, transferred from the State Department; the Lamar Papers; and Domestic Correspondence.